IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE, JURISDICTION

CRIMINAL APPEAL No. 664 OF 2001

Yakub Mumtaj Mohammed Khan,)
residing at Mukund Nagar, Vinabai)
Chawl, Dharavi, Mumbai - 400 017)
(at present in judicial custody) APPELLANT.
in Yerawada Central Prison, Pune)(Orig.Accused)

Versus

The State of Maharashtra,)
(at the instance of Dharavi)
Police Station C.R.No.420/98)) RESPONDENT.

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Mr.S.V.Marwadi with Mr.Vikram Yadav i/b Pradip Hingorani, Advocates for Appellant.

Smt.V.R.Bhosale, A.P.P for the State.

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CORAM : N.V.DABHOLKAR & SMT.V.K.TAHILRAMANI, JJ.

DATED : FEBRUARY 27, 2006.

ORAL JUDGMENT (PER TAHILRAMANI, J.) :

. Through this Appeal, the appellant-original accused has challenged the judgment and order dated 9th February, 2001 passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No.148 of 1999. By the said judgment and order, the learned Additional

Sessions Judge, convicted the appellant under Sections 498-A and 302 of the IPC. For the offence under Section 498-A of the IPC, the appellant was sentenced to suffer R.I. for three years and to pay a fine of Rs.5000/-, in default to suffer R.I. for six months; and for the offence under Section 302 of the IPC, the appellant was sentenced to life imprisonment and to pay a fine of Rs.15000/-, in default to suffer R.I for one year.

2. The prosecution case, briefly stated, is as under :

. Deceased Zarina was the daughter of P.W.4 Salma Rafik Khan. Zarina had got married to the appellant about one and half years prior to the incident. After the marriage, Zarina was residing with the appellant. The appellant and Zarina were residing in a rental room, which was on the loft which was approximately 10ft X 8 ft. The said structure was owned by P.W.2 Ramjor Yadav. Ramjor Yadav was residing on the ground-floor of the said premises, and appellant and his wife were residing in the loft of the said premises. The said loft

was in House No.339 of Vinoba Bhave Chawl, Mukund Nagar, Dharavi, Mumbai. On the night of 4th November, 1998, the appellant came home late at night in an intoxicated condition. He started abusing and assaulted his wife Zarina. This was at about 11:00 to 11:30 p.m.. P.W.2 Ramjor Yadav told the appellant that he should stop quarrelling. At about 12:00 midnight to 1:00 a.m., Ramjor Yadav heard Zarina shouting. Hence, he went to the loft. He saw that Zarina was sitting near the Mori, she was burning and was pouring water on her body, to extinguish the fire. The accused, who was present at that time, was sitting in a corner of the room. The public told Ramjor Yadav to take Zarina to the Hospital. Ramjor Yadav, then, took Zarina to Sion Hospital. Zarina came to be admitted in the Hospital. While, Zarina was being taken to the Hospital by P.W.2 Ramjor Yadav, she told him that the appellant assaulted her with leather belt and then he poured kerosene on her body from the stove and set her on fire. Zarina also told P.W.2 Ramjor Yadav that she herself poured water on her body and put-off the fire. After reaching the Hospital, Ramjor Yadav first took Zarina to the

Doctor. At the relevant time i.e. at about 1:30 a.m. of 5th November, 1998, P.W.1, Police Constable Kishor Shinde was on duty at Sion Hospital in the Casualty Department. Doctor called Police Constable Kishor Shinde. In the presence of Doctor, P.C. Kishor Shinde asked Zarina as to how she got burnt. Zarina told that her husband came home from his work late at night and as she had not cooked the food her husband wanted, he got angry and assaulted her. Her husband then poured kerosene on her body and set her on fire. P.W.1 P.C. Kishor Shinde made an entry in the E.P.R register at Sr.No.7841. The name of Ramjor Yadav was also mentioned in the E.P.R. register. An entry was also made in E.P.R register to the effect that the message was conveyed to Dharavi Police Station, on telephone at 02:00 a.m..

. On the night between 4th November, 1998 and 5th November, 1998, P.W.10 P.S.I. Madhukar Parab was attached to Dharavi Police Station. At about 02:00 a.m. he received a message from the duty-constable at Sion Hospital that one lady by name Zarina Yakub Khan was set on fire by her

husband and she was admitted to Sion Hospital. He was informed by the duty-constable at Sion Hospital that a neighbour Ramjor Yadav had brought her to the Hospital. After receiving the message P.W.10 P.S.I. Madhukar Parab immediately told the constable to contact the Special Executive Officer on telephone, which the Constable did.

. P.W.9 Dr.Abhijit Jadhav was on duty at Sion Hospital on 5th November, 1998. At 02:30 a.m., when Zarina was admitted in the Hospital, Dr.Jadhav spoke to Zarina and enquired as to how she sustained injuries. Zarina told him that it was a case of homicidal burns. P.W.9 Dr.Jadhav started treatment to Zarina and immediately informed about the patient to P.W.5 Dr.Dipika Akolekar. Dr.Jadhav on examination of Zarina found that she has sustained 71% burn injuries. P.W.5 Dr.Dipika Akolekar thereafter examined the patient on 5th November, 1998 at 03:00 a.m.. She noted the medical history of homicidal burns, as given by the patient.

. Soon thereafter P.W.3 S.E.O. Mr.Kale recorded the dying declaration of Zarina. The

said dying declaration is at Exh.9. In her dying declaration, Zarina told P.W.3 S.E.O. Mr.Kale that her husband came home from his work at about 11:30 p.m. on 4th November, 1998. Her husband was drunk at that time. As she had not prepared cauliflower vegetable, he picked-up quarrel with Zarina and assaulted her with leather belt. Thereafter, he poured kerosene from the stove on her body and set her on fire.

. Thereafter, P.W.10 P.S.I. Parab asked P.W.9 Dr.Abhijit Ashok Jadhav, who was attending to Zarina, whether the patient was in a condition to give statement. P.W.9 Dr.Jadhav gave endorsement (Exh.30) about the patient being in a fit condition to give her statement. Thereafter, on the same page P.S.I. Parab recorded the statement of the deceased. Zarina gave the same details as told to P.W.3 S.E.O. Mr.Kale in dying declaration Exh.9. The dying declaration recorded by P.W.10 P.S.I.Parab is at Exh.33. The said statement was treated as First Information Report.

. At about 05:30 a.m. on 5th November, 1998, P.W.4 Salma Khan was informed that her daughter

Zarina has sustained injuries on account of burns and Zarina was admitted to Sion Hospital. Salma immediately went to Sion Hospital. She made enquiries with Zarina. Zarina told her that at night she had not prepared cauliflower vegetable, hence Yakub (appellant) beat her with belt and thereafter poured kerosene on her body and set her on fire. She also told her mother that she herself poured water and extinguished the fire. She also told her mother that at that time Yakub was intoxicated.

3. On the basis of the complaint, investigation was started. The case was initially registered under Section 307 of IPC. However, thereafter, Zarina expired on 12th November, 1998, hence, the case was converted into a case under Section 302 of IPC. After completion of investigation, charge-sheet came to be filed. In due course, the case was committed to the Court of Sessions.

4. The charge came to be framed against the appellant under Sections 498-A and 302 of IPC. The accused pleaded not guilty to the said charge

and claimed to be tried. The defence of the accused is that of false implication and total denial. After going through the evidence adduced by the prosecution, the learned Additional Sessions Judge convicted and sentenced the appellant, as stated in Para 1 above. Hence, this Appeal.

5. We have heard Mr.Marwadi learned Advocate for the appellant and Smt.V.R.Bhosale learned A.P.P for the State. We have also perused the evidence on record as well as the judgment and order of the learned Additional Sessions Judge.

6. The conviction of the appellant is based on two recorded dying declarations i.e one recorded by P.W.3 Special Executive Officer Mr.Kale (Exh.9), and another recorded by P.W.10 P.S.I.Parab (Exh.33), and five oral dying declarations made to P.W.1, P.W.2, P.W.4, P.W.5 & P.W.9.

7. In both the dying declarations i.e Exh.9 & Exh.33, given to P.W.3 S.E.O Mr.Kale and P.W.10 P.S.I Parab respectively, Zarina has clearly stated that on 04th November, 1998 her husband

came home late at night in an intoxicated condition. He picked-up quarrel with her for not cooking cauliflower vegetable and assaulted her. Thereafter, he poured kerosene on her body and set her on fire. She herself extinguished the fire.

. Both the dying declarations are consistent as far as the role ascribed by Zarina to the appellant is concerned.

8. Mr.Marwadi submitted that dying declaration (Exh.9) recorded by P.W.3 S.E.O Mr.Kale cannot be relied upon because there is no endorsement of the Doctor on the said dying declaration to show that Zarina was conscious and in a fit state to give her dying declaration. On perusal of both the dying declarations, we find that dying declaration (Exh.33) recorded by P.W.10 P.S.I. Parab bears the endorsement of the Doctor regarding the condition of Zarina to give her statement. However, the dying declaration (Exh.9) recorded by P.W.3 S.E.O. Mr.Kale does not bear any such endorsement. In this connection we may refer to the evidence of P.W.3 S.E.O Mr.Kale, wherein he has stated that when he went to the burns ward, he

first met the Doctor there. He told the Doctor that he has to record the statement of that lady. The Doctor told him that the lady was in a condition to give her statement and the Doctor told S.E.O that he can record her statement. Thereafter, P.W.3 S.E.O Mr.Kale proceeded to record the statement of Zarina.

. Thus, it is seen that P.W.3 S.E.O Mr.Kale had made enquiry with the Doctor about the fitness of the patient Zarina to give her statement. Only after the Doctor stated that Zarina was in a fit condition to give her statement, S.E.O Mr.Kale recorded her statement. We have perused the dying declaration (Exh.9) recorded by P.W.3 S.E.O Mr.Kale. From the way the questions have been answered by Zarina, it can be seen that Zarina was in a fit condition to give her statement. At this stage, in respect of dying declaration, we may also refer to the decision of Supreme Court in the case of **"Laxman Vs. State of Maharashtra, reported in (2002) 6 Supreme Court Cases 710**." In the said case also the dying declaration did not bear endorsement of the Doctor stating that the

patient was in a fit state to give her statement. In this connection, the Supreme Court has observed that mere absence of Doctor's certification as to the fitness of the declarant's state of mind would not *ipso-facto* render the dying declaration unacceptable. In the said case, it is further observed that, a dying declaration without the endorsement of the Doctor can be relied upon, more so, when the fitness of the declarant's state of mind was proved by the testimony of the Magistrate who had recorded the dying declaration.

. In the present case the evidence of P.W.3 S.E.O. Mr.Kale, clearly shows that he had sought the opinion of the Doctor regarding the fitness of the patient to give her dying declaration. Only after the Doctor stated that she was in a fit state to give her dying declaration, thereafter the dying declaration came to be recorded by S.E.O. Mr.Kale. In such case in our opinion the said dying declaration can be safely relied upon.

9. As far as the dying declaration recorded by P.W.10 P.S.I. Parab is concerned, it does not suffer from any such infirmity. In that case, the

endorsement of the Doctor has been obtained before recording dying declaration of Zarina. As observed earlier by us, both the dying declarations are consistent and they clearly implicate the appellant.

10. Besides the two recorded dying declarations, Zarina had made oral dying declarations to five witnesses. The first oral dying declaration was made to P.W.2 Ramjor Yadav. After the incident took place, Ramjor Yadav who was the neighbour of Zarina, took Zarina to Sion Hospital. While, Zarina was being taken to the Hospital by P.W.2 Ramjor Yadav, she told him that the appellant assaulted her with leather belt and then he poured kerosene on her body from the stove and burnt her. Zarina also told P.W.2 Ramjor Yadav that she poured water on herself.

11. The second oral dying declaration has been made to P.W.1 P.C. Kishor Shinde. P.W.1 P.C. Kishor Shinde was the constable on duty at Sion Hospital on the night in between 4th November, 1998 and 5th November, 1998. He asked Zarina, in the presence of Doctor, as to how she got burnt.

Zarina told that her husband came home from his work late in the night and as she had not cooked the food her husband wanted, he got enraged and assaulted her. Her husband then poured kerosene on her body and set her on fire.

12. The third oral dying declaration has been made to P.W.9 Dr.Abhijit Jadhav, who was on duty at Sion Hospital on 5th November, 1998. He has stated in his evidence that at 02:30 a.m., when Zarina was admitted in the Hospital, he spoke to Zarina and enquired as to how she sustained injuries. Zarina told him that it was a case of homicidal burns. Dr.Jadhav on examination of Zarina found that she has sustained 71% burn injuries.

13. The fourth oral dying declaration has been made to P.W.5 Dr.Dipika Akolekar, who also examined Zarina on 5th November, 1998 at 03:00 a.m.. She noted the medical history of homicidal burns, as given by the patient.

14. The fifth and last oral dying declaration has been made to P.W.4 Salma Rafik Khan, mother of

Zarina. She has stated in her evidence that at about 05:30 a.m. on 5th November, 1998, she was informed that her daughter Zarina has sustained injuries on account of burns and was admitted to Sion Hospital. She immediately went to Sion Hospital. She made enquiries with Zarina. Zarina told her that at night she had not prepared cauliflower vegetable, hence Yakub (appellant) beat her with belt and thereafter he poured kerosene on her body and set her on fire. She also told her mother that at that time Yakub was intoxicated.

15. We have perused the evidence of all the five witnesses i.e. P.W.1, P.W.2, P.W.4, P.W.5 & P.W.9 to whom Zarina made oral dying declarations. We find that these witnesses have not been shaken in their cross-examinations on the aspect and contents of oral dying declarations made by Zarina to them. Nothing has been elicited in the cross-examination of any of these witnesses, so as to disbelieve their testimony. Hence, we have no hesitation in relying upon the evidence of these five witnesses.

16. Mr.Marwadi submitted that the stove and match box, which were seized from the spot, were not sent to Chemical Analyser nor it was produced before the Court. As far as the non-production of these articles before the Court is concerned, Exh.39, which has been produced by the prosecution, shows that on account of heavy rains the roof of the Malkhana collapsed and rain-water entered into the Malkhana and due to this the labels on the Muddemal got wet and destroyed. Therefore, it was not possible to identify which Muddemal belongs to which C.R.. In such case, we cannot find any fault with the prosecution for not producing the Muddemal in the Court. As far as not sending of these articles i.e. stove and match-box, to C.A. is concerned, we are of the opinion that in the facts and circumstances of this case, it would not raise any doubt about the prosecution case or create any dent in the prosecution case if the articles were not sent to C.A..

17. Mr.Marwadi further submitted that the clothes of the deceased, as well as other articles

seized from the spot were not sent to the Chemical Analyser. He has submitted that the investigation has not been properly conducted in the matter and it has caused him prejudice. He has submitted that it is the prosecution case that kerosene was poured on Zarina and thereafter she was set on fire. In such case, it was necessary to send the clothes of Zarina to C.A. to find out whether any traces of kerosene could be detected on the clothes and articles found at the spot. He has submitted that there was a quarrel between the husband and wife Zarina, and due to the quarrel she must have enraged and in that condition, she may have poured kerosene on herself and set herself on fire. However, this submission made by Mr.Marwadi is belied by the evidence of P.W.3 S.E.O Mr.Kale, P.W.10 P.S.I. Parab, and five witnesses to whom Zarina made oral dying declarations. We find nothing in the evidence of these witnesses so as to create any doubt about the veracity of their evidence or to disbelieve the evidence of these seven witnesses. Moreover, the spot-panchnama clearly shows that the lid of the tank of stove was open. The key to release the pressure of the stove was also in an open

condition. Moreover, the articles in the room were scattered. This position shows that some struggle has taken place and thereafter Zarina was set on fire. The evidence of P.W.2 Ramjor Yadav clearly shows that just a short while before the incident took place, a quarrel had taken place between the appellant and Zarina. One aspect which deserves mention is the conduct of the appellant. While Zarina was burning, the appellant was sitting in one corner of the room and watching Zarina getting burnt. The evidence of P.W.2 Ramjor Yadav clearly shows that when he heard shouts of Zarina and when he went to the loft, Zarina was sitting near the Mori and she was pouring water on her body to extinguish the fire. The appellant, who was present at that time, was sitting in one corner of that room watching Zarina getting burnt. He made no move to help her or take her to hospital. Thereafter the public told P.W.2 Ramjor Yadav to take Zarina to Hospital. Whereupon, he took Zarina to Sion Hospital and admitted her there. Thus, it is seen that not only the appellant did not make any move to put-off the fire, but, he also did not make any move to take Zarina to Hospital. This passive

conduct on the part of the appellant speaks volumes and it shows that Zarina did not get the burns on account of accident or committing suicide, but, on account of the appellant setting her on fire.

18. Mr.Marwadi submitted that it is a case of accident and as the room was small and Zarina was working on a stove in the said room, she must have caught fire. As far as the theory of accident is concerned, this theory is belied by the two recorded dying declarations and the five oral dying declarations. Moreover, from the situation at the spot, it is seen that the lid of kerosene tank of stove was open. So also the key to release the pressure of the stove was also in an open condition. Had it been a case of accident, the lid of the kerosene tank of the stove would not have been in an open condition. So also the key to release the pressure of the stove would not have been in released condition. Infact, the lid of the kerosene tank being in open condition supports the dying declarations of Zarina that her husband poured kerosene from the stove on her body. Thus, the dying declarations as well as the

circumstances on record belie the theory of Zarina accidentally catching fire.

19. Mr.Marwadi further submitted that there is no motive for the appellant to set Zarina on fire. He has submitted that the marriage of appellant and Zarina was a love marriage. The said marriage had taken place just one and half years prior to the incident, in such a case, the appellant would not have set Zarina on fire. In this connection, it is to be noted that the appellant was intoxicated at the time of the incident. Moreover, P.W.7 Dr.Bhangle, who has examined the appellant has stated that the patient has consumed alcohol. This statement corroborates the statement of Zarina that her husband was intoxicated at the time when the incident took place. From the evidence of witnesses as well as P.W.2 Ramjor Yadav, who is the neighbour of appellant and Zarina, it is clear that a quarrel was going on between the appellant and Zarina. Zarina has also stated that because she had not cooked cauliflower vegetable, her husband was enraged and he set her on fire. Thus, as such,

the motive for the appellant for setting Zarina on fire is made out. Even assuming that no motive has been proved by the prosecution, the two dying declarations i.e. Exh.9 & Exh.33, and the evidence of five witnesses to whom Zarina made oral dying declarations, clearly bring out the fact that it was the appellant who set Zarina on fire. In such a case, the question of motive pales into insignificance.

20. Mr.Marwadi submitted that the dying declarations recorded by P.W.3 & P.W.10 respectively are in Marathi, and Zarina being a Muslim would not be conversant with Marathi and hence it raises some doubts in respect of these two dying declarations. In this connection we may advert to the evidence of P.W.4 Salma Rafik Khan, who is the mother of Zarina. Salma has stated that her maiden name was Sunita Ananda Jagtap and she was married to Rafik Khan. Sunita Ananda Jagtap, being Maharashtrian, her mother-tongue would be Marathi. As such, her daughter Zarina would be very well conversant with Marathi language. It would be very easy to Zarina to follow Marathi language; and she would naturally

and immediately respond to the questions put to her, in Marathi language and reply in Marathi.

21. Thereafter, Mr.Marwadi submitted that had the appellant actually committed the offence, he would have run away from the spot and he would not have been found sleeping in his house. Mr.Marwadi has pointed out the evidence of P.W.10 P.S.I. Parab, wherein the witness has stated that when he came to the spot for spot-panchnama, the accused was sleeping there. Thereafter the accused was taken into custody. Thus, from the evidence of P.W.10 and on perusal of spot panchnama, it is seen that the appellant was very much present in his hut at about 07:30 a.m.. Mr.Marwadi submitted that this shows the innocent state of mind of the accused. In this connection we may refer to the evidence of P.W.7 Dr.Samir Bhangle, who has stated that when he examined the accused he found that the accused had consumed alcohol. Moreover, the dying declarations given by Zarina shows that the accused was in an intoxicated condition. It appears that on account of his heavy intoxication, the accused went to sleep in the hut. In any event, we cannot disregard the two recorded dying

declarations and the evidence of various other witnesses, who have stated about Zarina telling them that her husband (appellant) set her on fire. The evidence of these witnesses is cogent and consistent, and we have no hesitation in placing reliance on the same.

22. As far as the offence under Section 302 of the IPC is concerned, there is ample evidence on record. However, as far as the offence under Section 498-A of the IPC is concerned, we find that there is no reliable evidence on record to show that the appellant is guilty of the offence under Section 498-A. Except, for the incident when Zarina sustained burn injuries, Zarina does not speak of any other ill-treatment, harassment or cruelty meted-out to her by the appellant. Infact, P.W.4 Salma Khan is the only witness who speaks about Zarina complaining to her that the appellant was harassing her and Zarina was afraid of the appellant and once appellant had assaulted her. However, this averment made by witness Salma have been proved to be omissions. In this view of the matter, we find that there is no reliable evidence on record to show that the appellant is

guilty of an offence under Section 498-A of IPC.

23. In the result, the Appeal is partly allowed. The conviction and sentence of the appellant under Section 498-A of IPC is set-aside. However, the conviction and sentence of the appellant under Section 302 of IPC is confirmed. The appellant is in jail. He shall serve out the sentence.

24. Registrar (Judicial) shall ensure supply of certified copy of this judgment, free of costs, to the appellant, through prison authorities.

(N.V.DABHOLKAR,J.)

(SMT.V.K.TAHILRAMANI,J.)